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September 28, 2010

VIA EMAIL

The Honorable Claire McCaskill, Chair
The Honorable Orrin G. Hatch, Vice Chair
Senate Impeachment Trial Committee
United States Senate
Russell Senate Office Building, Room B-34A
Washington, D.C. 20002

Re: *Impeachment of Judge G. Thomas Porteous, Jr.*

Dear Senator McCaskill and Senator Hatch:

This letter responds to House Impeachment Counsel's letter dated September 28, 2010, arguing that they should be allowed to introduce voluminous exhibits into the Senate Impeachment Trial Committee's (the "Committee") record long after the close of the trial. After House Impeachment Counsel repeatedly failed to address this issue in a timely fashion during the trial, they and Defense Counsel have exchanged numerous correspondence regarding potential exhibits the House wishes to introduce at this late date. The Senate Committee Staff also held a further meeting with all counsel on this subject yesterday. At that time, House Impeachment Counsel requested permission to submit a letter to the Committee concerning the narrow issue of Jacob Amato's Calendars and Credit Card Records. There was no indication that the House intended, or would be allowed to, re-hash all of its arguments concerning the disputed proposed exhibits that the House failed to introduce at trial. The House having done just that, however, Judge Porteous is compelled to submit the following response.

To start, Judge Porteous acknowledges the House's withdrawal of its request to admit the following irrelevant, unnecessary, and/or prejudicial proposed House Exhibits: 13, 21(a), 34, 44, 88(a), 88(b), 88(c), 88(i), 91(a), 91(b), 327, 328, 348, 349, 437, 438, 449, and 450.

With regard to the House's remaining requests to admit additional exhibits, Judge Porteous responds as follows:

Fifth Circuit and House Testimony

As discussed with the Committee Staff yesterday, the defense strongly disagrees with the House's assertion that the Committee has already made the decision to

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admit the testimony from the Fifth Circuit and House proceedings into the record. As reflected in the Committee's Disposition, dated August 25, 2010, the House simply requested that "the complete evidentiary hearings of the Fifth Circuit judicial disciplinary proceedings and the House Impeachment task Force hearings, as well as all related documentary evidence admitted into the record of those proceedings, be deemed admissible." The Committee's determination of the admissibility of these records did not dictate whether any portion of that material would ultimately be admitted into the record. The Committee reserved ruling on that later question until the evidentiary hearing – and it is on this basis that Judge Porteous prepared (and the House Managers should have prepared) for trial. Moving the admission of individual exhibits, allowing for objections, and ruling on admission of specific exhibits at the trial, enabled both sides, and the Senators, an opportunity to evaluate the admitted evidence in the context of the testimony and allowed each side to question or cross examine the relevant witnesses about each such exhibit.

Allowing the House to admit literally reams of prior testimony from the Fifth Circuit proceedings and the House Impeachment Task Force Hearings would significantly, unnecessarily, and unfairly prejudice Judge Porteous. First, much of the prior Fifth Circuit and House testimony is duplicative and cumulative. Nearly **every witness** for whom the House now seeks to admit prior testimony **already testified before the Committee.**[1] Thus, it is clear that the House's argument that the House relied on the belief that all previous Fifth Circuit and House testimony would be admitted is baseless. The House would not have felt the need to call each and every witness again, and subject those same individuals to cross-examination, if they truly believed that all of the previous testimony would necessarily be admitted. Having called them, the House could have and should have elicited whatever testimony it found relevant from those witnesses while they were on the stand, testifying before the Committee – when the defense and the Senators could have cross examined and questioned those witnesses as to all of their admitted testimony. Moreover, if it felt the witnesses' testimony was not clear or insufficiently supportive of the House's view of the evidence, and needed bolstering, the House should have sought the admission of certain prior testimony during the evidentiary hearings, so that the Committee could consider arguments for and against such a request. If that testimony was admitted, the defense would have had an opportunity to cross examine on that additional testimony, a right lost to the defense if this testimony is now admitted, after trial, on a wholesale basis. Allowing the admission of the prior Fifth Circuit and House testimony now will facilitate and encourage improper "cherry-picking" of favorable testimony that will not aid the Senate in its deliberations.

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[1] The only witnesses who testified before the Fifth Circuit or the House, but not the Committee, are William Heitkamp (Chapter 13 Trustee in the Southern District of Texas), Gerald Fink (FBI Financial Analyst), and William Greendyke (the bankruptcy judge who presided over the Porteouses' bankruptcy case). The House had ample opportunity to call each of these witnesses to testify before the Committee. In fact, the House had subpoenaed Mr. Greendyke to testify and then did not call him. Thus, the House specifically elected not to rely on these witnesses' testimony, presumably because they are minor witnesses, whose testimony the House determined was not sufficiently probative to warrant their calling before the Committee.

Although there is good reason to omit all testimony related to the Fifth Circuit and House proceedings, if the Committee is disinclined to do so, Judge Porteous suggests that the Committee adopt an alternative approach. Both parties should be required to designate those specific portions of the transcripts that they seek to have admitted, with the express understanding that only that testimony that addresses subjects which were expressly and substantively discussed during the Committee's evidentiary hearings should be admitted. Such a resolution would guard against the admission of topics and facts substantively ignored during the Senate proceedings and, therefore, not subject to cross examination or Senators' questioning. This procedure would align with the Committee's previous disposition on these issues, which stated that the goal of the admission of such materials would be to "aid in the deliberations by the full Senate as it weighs the relevance and probative value of the evidence." If previous testimony that was not raised in the Senate proceedings is admitted, Judge Porteous will be deprived of a critical due process right – cross-examination of the evidence submitted against him.[2]

Thus, if, during the House proceedings, a witness discussed allegations of misconduct by Judge Porteous and those same allegations were not raised in the direct examination of the same witness during the Committee's evidentiary hearings or in the parties' stipulations, then the House should be barred from relying on such previous testimony in arguing its case. If, on the other hand, a witness testified substantively about a topic in both the House and Senate proceedings, the parties could so designate those portions of the House transcripts they seek to be admitted.

There is precedent for just this sort of selected admittance of transcripts excerpts. In its disposition, the Committee noted that "the Claiborne Committee admitted select transcripts from Judge Claiborne's second criminal trial."

Demonstratives

Judge Porteous does not object to the inclusion of the demonstratives used by the parties during the evidentiary hearings so long as (1) those demonstratives are placed into a separate section or appendix to the Committee report, which notes that such demonstratives are not substantive evidence, and (2) the demonstratives that Judge Porteous utilized at the evidentiary hearings are also included in that section or appendix.

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[2] The level of cross examination done by the defense in the Fifth Circuit and the House proceedings was an inadequate substitute for cross examination at trial. In the Fifth Circuit, Judge Porteous was required to appear without counsel. The House proceedings were conducted in the form of a "grand jury," at which Judge Porteous's counsel was allowed only a limited right to cross examine witnesses. That right of cross-examination was significantly less robust than that afforded at trial.

Jacob Amato's Calendars and Credit Card Records

Judge Porteous opposes the admission into the record of House Exhibits 21(b) and 283 because Jacob Amato himself questioned the legitimacy and accuracy of the calendar pages contained in those documents during his testimony before the Committee. When shown what the House Managers represented to be a page of Mr. Amato's June 1999 calendar, Mr. Amato testified, "I think it was miscopied someplace along the way. I think that's part May and part June, the calendar." (Senate Tr. Vol. I at 139:12-17.) When pressed by the House, Mr. Amato reiterated that the calendar was "miscopied" (Senate Tr. Vol. I at 140:12-14) and that he did not "know if it [the fishing trip] was in May or June." (Senate Tr. Vol. I at 15-22.) Given this critical discrepancy, and Mr. Amato's statement that the calendar pages at issue were "miscopied," Judge Porteous objects to the introduction of this unreliable and suspect material.

House Impeachment Counsel's attempt to resolve this "confusion" and rehabilitate its defective exhibits by relying on prior testimony is inappropriate and unavailing. That prior testimony cannot change the fact that Mr. Amato has now questioned in sworn testimony the legitimacy and accuracy of the copies of his calendars that the House is seeking to admit into the Senate record.

With regard to House Exhibit 21(c), Judge Porteous objects to the introduction of this miscellaneous set of credit card records because it does not prove anything related to Judge Porteous – Mr. Amato testified that he took many lawyers and judges out for meals and there is no way to tie these credit card charges to any specific meal with Judge Porteous – and is therefore irrelevant. The House Managers have failed to establish any foundation for admission of this exhibit into the record. Had the House sought to admit this exhibit during Mr. Amato's testimony, the defense would have had an opportunity to object and/or cross-examine the witness concerning the constituent documents. As it is, having waited until after the conclusion of the trial to seek to admit this document, the House has deprived Judge Porteous of this key due process right. The Committee should not countenance such inequity.

Green Pleadings

In its letter, the House reiterates its request to admit House Exhibits 93(a) (the Indictment against Judge Alan Green) and 93(b) (the five page judgment against Green.) Unsatisfied with the arguments that they set forth in yesterday's meeting, the House has submitted four arguments in its letter that the House believes bolsters its case for admission of the exhibits. None of these arguments explain why facts related to Green were not made part of the House's case at trial, why they did not call Green as a witness, why they did not elicit testimony related to his conduct, and why they failed to attempt to introduce these exhibits during the evidentiary hearings. Instead, the House simply submits a relevance argument that attempts to connect Green to Porteous, drawing parallels that are not supported by the record or any testimony. These arguments evidence the House's overall intent – to use evidence not elicited or discussed at trial (and therefore not subject to cross-examination) in its argument for conviction. If such admission is allowed, it would weaken substantially the purpose and integrity of the evidentiary hearings.

Moreover, the House's four arguments are unavailing.

First, the House suggests that Green's conviction corroborates Lori Marcotte's testimony that Judge Porteous helped the Marcottes form a relationship with Green. Judge Porteous is not mentioned by name or by reference in the indictment or judgment against Green. (House Ex. 93(a) and 93(b).) Judge Porteous is not listed as a co-conspirator in that indictment and the lunches that Green is alleged to have attended with the Marcottes are not the same ones Judge Porteous is alleged to have attended while on the federal bench. The House did not even raise Judge Green's name in their direct examination of Ms. Marcotte at the evidentiary hearings and Green's name was raised only tangentially – at one point by expert Professor Dane Ciolino, who stated "Judge Green wasn't convicted of a count involving the Marcottes, I believe." (Senate Tr. Vol. IV at 1672.)

Second, the House argues that the Green exhibits demonstrate the damage resulting from Judge Porteous vouching for the Marcottes. Yet, House Exhibits 93(a) and 93(b) do not discuss any vouching by Judge Porteous – or even reference Judge Porteous himself. No evidence was adduced, or even discussed, during the evidentiary hearings regarding Judge Porteous vouching for the Marcottes in relation to Judge Green.

The House's third argument – that Judge Porteous's continued presence on the federal bench would be injurious because other state judges who engaged in corrupt relationships with the Marcottes have gone to jail – assumes far too much and is non-sensical. First, it assumes all of the House's allegations against Judge Porteous are true. Second, it ignores the fact that Bodenheimer and Green were accused of crimes far greater than that being alleged against Porteous. Bodenheimer engaged in a scheme to plant evidence on an individual. The House has not alleged an offense by Judge Porteous even remotely close to such a crime. Green was caught on tape improperly taking cash from the Marcottes. In contrast, both of the Marcottes have expressly denied ever giving cash to Judge Porteous. Moreover, Green was convicted of mail fraud and nothing more. The House's allegations against Judge Porteous bear no resemblance to mail fraud. Lastly, the House's argument is entirely circular – "we need evidence related to Green's conviction to prove that Porteous is guilty because Green was guilty and therefore Porteous must be guilty." As a result, any evidence taken out of House Exhibits 93(a) and 93(b) would necessarily be based on supposition and leaps in logic, not supported by the evidence before the Senate.

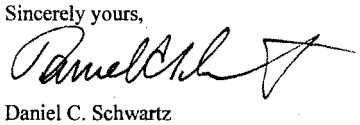
Finally, the House's fourth argument states that Green's conviction involved his taking the same sorts of judicial acts for the Marcottes in terms of setting bonds as those alleged against Judge Porteous. This is, on its face, false. House Exhibit 93(b) evidences only that Green was convicted of mail fraud. The mail fraud count of the indictment discusses mailings Green initiated, including two $5,000 checks to Bail Bonds Unlimited. Judge Porteous is not alleged to have engaged in mail fraud or to have ever sent or received checks to or from Bail Bonds Unlimited and the Marcottes. Paragraphs four and five of the indictment, referenced in the House letter, relate to

bond splitting and suggest that the splitting of a bond is inherently improper and illegal. Evidence adduced during the Committee's evidentiary hearings has shown that not only is bond splitting legal, but it also was a widely accepted and proper practice in Gretna, Louisiana while Judge Porteous was a state judge.

Accordingly, Judge Porteous strongly objects to the admittance of these exhibits.

We appreciate your attention to this matter and look forward to the Committee's fair resolution of these issues.

Sincerely yours,



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